172

(1)

Supreme Court, U.S.
FILED

OCT 5 - 2010

OFFICE OF THE CLERK

No. 10-464

In The

Supreme Court of the United States

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, REGIONAL ADMINISTRATOR; LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
dof@lf-lawfirm.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Environmental Protection Agency's substantive interpretation of law (in this instance, 40 C.F.R. § 268.3), propounded after a factual investigation and the application of law to the facts that were found, escapes judicial review because it is announced in the body of a Determination to forego correction of state agency practices EPA oversees.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies, nor does it or any of its affiliate businesses have shares issued to the public.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement	4
Reasons for Granting the Writ	10
A. The APA and the Presumption of Reviewability	11
B. Fifth Circuit's Conflict with Other Courts' Holdings	12
1. Other courts distinguish between a decision not to enforce and an announcement of a new statutory interpretation in the course of making such a decision	13
2. Other courts have concluded that there is law to apply, thus rebutting the presumption of non-reviewability, even when the law in question uses discretionary language, such as "may"	15

TABLE OF CONTENTS – Continued

Page

C. Had the appellate court engaged in the correct analysis, it would have discovered that there is indeed law to be applied here, and EPA's Determination is thus subject to review under the APA 17

1. EPA's Determination is not committed to unfettered agency discretion; the agency's regulations provide the Court with law to apply 18

2. EPA's Determination was akin to an announcement of a new interpretation of its rules, and thus, was subject to judicial review 19

Conclusion 24

Appendices

Fifth Circuit Court of Appeals Opinion ..... App. 1

Fifth Circuit Court of Appeals Final Judgment ..... App. 5

United States District Court for the Western District of Texas, Austin Division Memorandum Opinion and Order ..... App. 7

United States District Court for the Western District of Texas, Austin Division Final Judgment ..... App. 13

TABLE OF CONTENTS – Continued

Page

United States Environmental Protection Agency Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program, Response to the Petition ..... App. 15

Fifth Circuit Court of Appeals Denial of Petition for Rehearing ..... App. 38

TABLE OF AUTHORITIES

Page

CASES:

Abbott Lab. v. Gardner, 387 U.S. 136 (1967) 11

Amalgamated Transit Union International, AFL-CIO v. Donovan, 767 F.2d 939 (D.C. Cir. 1985) 14

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 11

Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542 (7th Cir. 1985) 16

Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) 14

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 11

Edison Electric Institute v. U.S. EPA, 996 F.2d 326 (D.C. Cir. 1993) 15

Heckler v. Chaney, 470 U.S. 821 (1985) ..... *passim*

International Union of Bricklayers v. Meese, 761 F.2d 798 (D.C. Cir. 1985) 14

International Union, United Automobile Aerospace & Agricultural Implement Workers v. Brock, 783 F.2d 237 (D.C. Cir. 1986) 13, 14, 15, 22

Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987) 8, 9, 13

Montana Air Chapter No. 29 v. Federal Labor Relations Authority, 898 F.2d 753 (9th Cir. 1990) 15

TABLE OF AUTHORITIES – Continued

Page

Nat'l Wildlife Federation v. U.S. EPA, 980 F.2d 765 (D.C. Cir. 1992) 15, 23

Pub. Citizen, Inc. v. EPA, 343 F.3d 449 (5th Cir. 2003) 9

Socop-Gonzalez v. INS, 208 F.3d 838 (9th Cir. 2000) 16

STATUTORY PROVISIONS AND RULES:

5 U.S.C. § 701(a) 1, 11

5 U.S.C. § 702 2

5 U.S.C. § 706 3

28 U.S.C. § 1257(a) 1

42 U.S.C. §§ 6921-6939e 4

40 C.F.R. § 268.3(a) 20

40 C.F.R. § 271.22 18

40 C.F.R. § 271.22(a)(3)(i) 4

40 C.F.R. § 271.23 18

40 C.F.R. § 271.23(b)(1) 18

OTHER AUTHORITIES:

55 Fed. Reg. 22,520 (June 1, 1990) 20

Texas Disposal Systems Landfill, Inc. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals was not officially reported. It is reproduced in the Appendix herein at App. 1-4. The decision of the U.S. District Court for the Western District of Texas, Austin Division, was also not officially reported; it is reproduced in the Appendix at App. 7-12.

JURISDICTION

The judgment of the Court of Appeals was issued on May 7, 2010. App. 5-6. Petitioner's timely petition for rehearing was denied on July 7, 2010. App. 38-39. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 701(a). Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review, or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

This case concerns an agency's informal adjudication of a specific set of facts and the application of the law to those facts. The Environmental Protection Agency (EPA) adjudicated the facts and law in response to a petition filed by Texas Disposal Systems Landfill, Inc. (TDSL), requesting that EPA withdraw delegation of Texas's hazardous waste program. TDSL alleged that Texas's environmental agency, Texas Commission on Environmental Quality (TCEQ), failed to enforce its hazardous waste regulations, as required by the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6921-6939e. *See* 40 C.F.R. § 271.22(a)(3)(i). EPA denied TDSL's petition in a 12-page document entitled, "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program" (hereinafter referred to as the "Determination"), on May 16, 2006. *See* App. 15.

Before responding to TDSL's petition, EPA conducted an investigation into the allegations in the petition. EPA sought and received input from both the state agency, TCEQ, and from other affected private entities. TDSL also provided additional documents and information in support of its petition.

Following its informal investigation, EPA issued its "Determination," which not only included a recitation of facts, based on EPA's investigation of those facts, but it also included its interpretation of applicable law – a new interpretation, in TDSL's view, unsupported by the express language in its regulations or in the Federal Register Preamble to those regulations. EPA's interpretation, as announced in the Determination, allows deliberate dilution of toxic characteristic hazardous waste with non-hazardous waste. The Determination approved Texas's application of the RCRA hazardous waste regulations. Ultimately, EPA concluded that no cause exists to initiate withdrawal of Texas's hazardous waste program.

The following summary of the facts giving rise to TDSL's filing of the petition for withdrawal of program approval provides a useful context for understanding EPA's Determination:[1]

In October 1997, while transporting a load of cathode ray tubes ("CRTs") for Zenith Corp., trucker Penske was involved in a vehicular accident in Central Texas, which resulted in broken CRTs on the roadway and side of the road. The broken CRTs were known to be toxic characteristic hazardous wastes due to their lead content. In fact, Zenith had

---

[1] These facts are taken from the allegations in TDSL's Amended Complaint filed in the District Court. They were not adjudicated by the District Court, as the court dismissed the cause.

previously characterized the CRTs as hazardous if damaged. Nevertheless, several truckloads of broken CRTs – toxic characteristic hazardous waste – were hauled to Petitioner TDSL's municipal solid waste landfill, where they were commingled with municipal solid waste and cover soil.

Initially, TDSL removed from the surface of the landfill's working face the toxic characteristic hazardous waste and any other solid waste with which it was commingled. Several months later, Penske arranged for the removal from the landfill of the segregated waste. Although Penske ultimately removed the hazardous waste that had been segregated from the surface of the landfill's working face, toxic characteristic hazardous waste that was beneath the surface remained at the landfill, commingled with other solid wastes and soils.

In an effort to have the commingled hazardous waste removed from its landfill, TDSL sought assistance from the TCEQ to require Penske and Zenith to properly manage and remove the remaining hazardous waste in accordance with state and federal law. TCEQ initially instructed Penske to remove the hazardous waste mixture from the landfill, but, then, it authorized Penske and Zenith to manage the entire quantity of the exhumed mixture as a non-hazardous waste. Because TCEQ's position conflicted with EPA's rules – rules intended to create "cradle-to-grave" regulation of hazardous wastes – and exposed TDSL to increased risks, TDSL petitioned EPA to withdraw Texas's hazardous waste program approval.

Upon receiving TDSL's petition to withdraw program approval, EPA initiated an informal investigation of the allegations in the petition. At the conclusion of its informal investigation, EPA issued its Determination, which TDSL alleges, includes erroneous interpretations of law, incorrectly adjudicates certain facts, and ultimately concludes that no cause exists to initiate formal withdrawal proceedings. *See* App. 37.

Importantly, EPA's Determination did not confine itself to determining whether it should initiate withdrawal of Texas's hazardous waste program approval. Rather, EPA's 12-page Determination characterized the issue to be addressed as a "question of law" and proceeded to provide an interpretation of that law:

> Whether a RCRA characteristic hazardous waste mixed with non-hazardous material is still hazardous waste under RCRA and must be treated and disposed of pursuant to RCRA land disposal restrictions ["LDRs"] even though the resulting mixture tests below RCRA characteristic hazardous and land disposal restriction levels.

App. 23. It then applied that law to the facts it adjudicated to be true (some of which TDSL disputes).

For instance, in framing the issue to be considered, EPA accepted that the characteristic hazardous waste was inextricably "mixed" with non-hazardous material, creating one waste stream, even though TDSL alleged that the hazardous waste was

identifiable and segregable. Moreover, the issue presumes that the "resulting mixture" tests below RCRA characteristic hazardous and land disposal restriction levels, although this too was disputed. EPA also suggested that when the hazardous waste was mixed with the municipal waste, the resulting mixture might have resulted in a new "point of generation," although there were no facts alleged to suggest that a new waste stream was generated. Ultimately, EPA approved of TCEQ's actions and interpretations of federal law and determined that the criteria for initiating withdrawal proceedings were not present in this case – all based on information and allegations that it assumed were true, though not reflected in or supported by TDSL's petition filed with the agency.

TDSL sought to challenge EPA's Determination under the federal Administrative Procedure Act (APA). TDSL's intention in doing so was not to force EPA to withdraw Texas's RCRA delegation. Rather, TDSL sought to challenge EPA's adjudication of facts and its interpretation of law to those facts, as arbitrary and capricious.

EPA thereafter filed a motion to dismiss TDSL's complaint, arguing that the District Court had no jurisdiction over TDSL's claims because EPA's Determination was akin to a discretionary decision not to enforce – a decision not subject to judicial review, according to EPA. The District Court agreed that it had no subject-matter jurisdiction to consider TDSL's claims and granted the Motion to Dismiss. App. 7. For support, the District Court cited *Interstate Commerce*

Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, at 283 (1987).

In dismissing TDSL's claims, the District Court relied on one of two exceptions to the presumption of reviewability of an agency decision: the presumption that a decision committed to agency discretion is not reviewable. This exception is triggered only when there is no law to apply to the review of the agency action.

On appeal, the Fifth Circuit Court of Appeals affirmed the District Court's decision, citing principally, *Interstate Commerce, supra*, and *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 452 (5th Cir. 2003), and explaining that EPA's decision was not reviewable under the APA, because the decision could be viewed a decision of nonenforcement. Without analyzing or commenting on the substance of EPA's Determination, the Fifth Circuit Court of Appeals summarily determined that EPA's decision simply could not be the subject of an APA action, regardless of what was said in that Determination.

On July 7, 2010, the Fifth Circuit Court of Appeals denied Petitioner TDSL's petition for rehearing. App. 38.

REASONS FOR GRANTING THE WRIT

The district court and the appellate courts' decisions reflect a split with other circuit courts regarding the types of agency decisions that are unreviewable under the APA. In this case, the district court and the court of appeals looked no further than the fact that EPA had chosen not to initiate delegation withdrawal proceedings; this alone was sufficient to summarily determine that no review of that decision could be had. The agency's decision was akin to a prosecutorial decision not to enforce, they reasoned, which is unreviewable. Neither court delved into the Determination itself to determine whether the document indeed amounted to nothing more than a recitation that EPA refused to initiate withdrawal proceedings, for which there was no law to apply to a judicial review of the decision.

But other courts have taken a more nuanced and analytical approach in similar types of cases. Rather than employing a simplistic and superficial test, courts have employed the more measured analysis that this Court has used, determining whether the agency's action truly falls within the category of a decision not to enforce and searching for standards against which the agency's action might be reviewed. Had the Fifth Circuit undertaken a similar inquiry, it too might have determined that the EPA's Determination document was much broader than a simple decision not to enforce. It was a new interpretation of its regulations, and indeed, there is law against which to review this new interpretation.

A. The APA and the Presumption of Reviewability.

The APA presumptively entitles a person suffering legal wrong because of agency action to judicial review thereof. *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). "Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967); *accord Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). There are two exceptions to this presumption of reviewability: (1) statutes preclude judicial review and (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). The district court and the court of appeals relied on the second exception to reviewability here, in reaching their decision to dismiss the case.

The District Court concluded, and the court of appeals agreed, that it lacked subject-matter jurisdiction to entertain TDSL's APA claims because "EPA's Determination not to withdraw the Texas RCRA Program" is an unreviewable action committed to agency discretion. *See* App. 11.

The exception to judicial review for action committed to agency discretion by law is a narrow one; it applies only in "rare instances." *Volpe*, 401 U.S. at 410. This exception applies only where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.*

This Court has explained that a decision not to enforce is unsuitable for judicial review because of the many variables that factor into the agency's decision – variables that agencies are far better equipped to deal with in the proper ordering of their priorities. For instance, the agency must assess whether agency resources are best spent on a particular violation, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all. *Heckler v. Chaney,* 470 U.S. 821, 831 (1985). Thus, an agency's refusal to initiate enforcement is "presumptively unreviewable."

The Court emphasized, however, that the presumption may be rebutted. If, for instance, Congress has provided the courts with law to apply, judicial review is available. *Id.* at 832-33. Even agency decisions that could be characterized as decisions not to take enforcement action are nonetheless reviewable where there is "law to apply." *Id.*

B. Fifth Circuit's Conflict with Other Courts' Holdings.

The Fifth Circuit Court of Appeals provided two separate reasons in support of its holding that EPA's Determination is not subject to judicial review. First, quoting applicable EPA regulations addressing the criteria and procedure for commencing delegation withdrawal proceedings, the Fifth Circuit determined

that the inclusion of the term "may" demonstrates that there are no mandatory standards by which the court can review EPA's decision. For support, the court cited this Court's opinion in *Heckler v. Chaney*, 470 U.S. 821. App. 2-3. Second, the appellate court held that EPA's interpretation and analysis of applicable law, in its Determination document, did not render the decision a reviewable one. For support, the court cited this Court's holding in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987), and summarized it thusly: "an action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action." App. 4.

Both of these rationales cited by the appellate court, however, present a direct conflict with holdings from other circuit courts regarding this same issue. Other courts have not applied such a broad and simplistic interpretation of the two cases cited above.

1. Other courts distinguish between a decision not to enforce and an announcement of a new statutory interpretation in the course of making such a decision.

For instance, the D.C. Circuit Court of Appeals has recognized that an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable. *International Union, United Automobile, Aerospace & Agricultural Implement Workers*

v. Brock, 783 F.2d 237, 245 (D.C. Cir. 1986). In complete contrast to the Fifth Circuit Court's holding in this case, the D.C. Circuit held that "even if a statutory interpretation is announced in the course of a nonenforcement decision, that does not mean that it escapes review altogether." *Id.* at 246 (citing *International Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985)). That court explained that when a legal challenge focuses on an announcement of a substantive statutory interpretation, courts are emphatically qualified to decide whether an agency has acted outside of the bounds of reason. *Id.* at 245-46 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Amalgamated Transit Union International, AFL-CIO v. Donovan*, 767 F.2d 939, 944 n.7 (D.C. Cir. 1985)). "Indeed, it seems almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law," the Court announced. *Id.* at 246.

In determining the availability of judicial review, courts have explicitly noted the distinction between the reviewability of an agency's decision not to take an enforcement action, and the reviewability of an agency's "pronouncement of a new statutory interpretation in an opinion explaining the nonenforcement decision." *Int'l Union*, 783 F.2d 237, 239 (D.C. Cir. 1986). Ultimately, the court in *International Union* held that the agency's "ultimate decision not to take enforcement action is nonreviewable," but the agency's "pronouncement of new statutory interpretations

in an opinion explaining the nonenforcement decision is reviewable." *Id.* This distinction between the enforcement decision itself and a substantive statutory interpretation propounded in the context of that decision has been relied upon by the Ninth Circuit, as well as other panels of the D.C. Circuit. *See Montana Air Chapter No. 29 v. Federal Labor Relations Authority*, 898 F.2d 753, 756, 758 (9th Cir. 1990); *Edison Electric Institute v. U.S. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); *Nat'l Wildlife Federation v. U.S. EPA*, 980 F.2d 765, 772-73 (D.C. Cir. 1992).

The Fifth Circuit's opinion in this case is at odds with the holdings from the various other appellate courts cited above, and this Court should take this opportunity to further explain the limited circumstances in which a decision not to enforce is presumed to be non-reviewable.

2. Other courts have concluded that there is law to apply, thus rebutting the presumption of non-reviewability, even when the law in question uses discretionary language, such as "may."

Courts also differ with the Fifth Circuit's summary determination that a decision not to commence withdrawal proceedings must be non-reviewable because such a decision is discretionary, and there is thus, no law to apply. *See* App. 4. The Fifth Circuit recounted the procedures outlined in EPA's regulations, which describe how EPA may respond to a

petition to withdraw state delegation authority. The court emphasized that the rule uses the permissive term "may" when describing the EPA's Administrator's options for responding to such a petition. This term, explained the court, renders EPA's decision not to initiate withdrawal proceedings unreviewable by a court.

But other courts have taken a different approach, choosing to examine the decision in question to determine whether there is law to apply.

The Seventh Circuit Court of Appeals, for example, has held: "It is not significant in our view that the regulation does not expressly require the Commission to consider these factors, but instead states that it 'may' consider them. The use of the term 'may' does not indicate that the Commission is free to ignore factors that in the past it has designated as highly relevant. Nor should the use of such discretionary language in a regulation exempt an agency from its obligation to follow its rules or policies upon which the public justifiably has come to rely." *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1550 (7th Cir. 1985).

Similarly, several courts have recognized repeatedly that this Court's holding in *Chaney* does not bar judicial review when an agency's regulation provides the Court with law to apply. *See, e.g., Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000) (citing decisions from First, Third, and Sixth Circuit Courts of Appeals). In this case, the Fifth Circuit did

not conduct a meaningful search to determine whether there is law to apply in reviewing EPA's Determination. Its analysis, or lack thereof, is in direct conflict with other courts of appeals' holdings, wherein even discretionary decisions were determined to be reviewable under the APA, if the agency decision included interpretations of law that courts could review.

C. Had the appellate court engaged in the correct analysis, it would have discovered that there is indeed law to be applied here, and EPA's Determination is thus subject to review under the APA.

Had the appellate court conducted a meaningful review of EPA's Determination and the regulations governing responses to petitions to withdraw, it would have discovered that there is law to be applied here. First, EPA's response to the petition to withdraw delegation authority is at least somewhat circumscribed by its own regulations. And second, EPA's newly announced interpretation of disposal standards for toxic hazardous waste is a legal interpretation that can be reviewed against the clear language of EPA's rules to determine whether the interpretation is arbitrary and capricious or an abuse of discretion.

1. EPA's Determination is not committed to unfettered agency discretion; the agency's regulations provide the Court with law to apply.

EPA's regulations at 40 C.F.R. § 271.23 allow EPA's Administrator to order commencement of withdrawal proceedings in response to a petition from an interested person alleging failure of the State to comply with the requirements of Part 271 ("Requirements for Authorization of State Hazardous Waste Programs"), as set forth in Section 271.22. The Administrator *must* respond in writing to any petition to commence withdrawal proceedings. 40 C.F.R. § 271.23(b)(1). And he may conduct an informal investigation of the allegations in the petition *"to determine whether cause exists to commence proceedings."* 40 C.F.R. § 271.23(b)(1). In other words, should the Administrator initiate an informal investigation, the purpose and scope of that investigation is circumscribed by at least two other regulations: Section 271.4 (regarding requirements that a State program be consistent with the Federal program) and Section 271.22 (criteria for withdrawing approval of State programs).

Among the criteria enumerated in Section 271.22 and justifying withdrawal of State program approval are the following: "Failure to act on violations of permits or other program requirements" and "Failure to inspect and monitor activities subject to regulation." 40 C.F.R. § 271.22. These regulations alone

provide the Court with law to apply in reviewing EPA's Determination.

Among the factors that are not included in EPA's regulations are the following: whether the agency's resources are best spent on a particular violation, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all. In other words, the variables that agencies typically consider in determining whether to initiate enforcement and that weigh in favor of non-reviewability, as described in *Chaney*, are not among the criteria that EPA may consider in determining whether cause exists to initiate withdrawal proceedings. EPA's investigation into whether cause exists to initiate withdrawal proceedings is not, therefore, akin to a prosecutor's unfettered discretion in determining whether to pursue an indictment. EPA's investigation is constrained by certain criteria – criteria outlined in its own regulations – that it must consider in reaching its decision.

2. EPA's Determination was akin to an announcement of a new interpretation of its rules, and thus, was subject to judicial review.

A review of EPA's Determination in this case reveals that this Determination is not simply a refusal to enforce, as described in *Chaney*. Rather, the

Determination is more akin to an informal adjudication, applying a new interpretation of EPA's rules. Indeed, EPA did not simply decide that it would not enforce a particular violation. EPA determined that TDSL's "Petition . . . does not provide cause to order the commencement of withdrawal proceedings." TDSL's petition, of course, alleged misinterpretation of bedrock RCRA law.

Before reaching this decision, EPA conducted an informal investigation into the allegations made by TDSL, the Petitioner. Based on the information provided, EPA adjudicated the allegations in TDSL's petition and issued an affirmative act of approval of TCEQ's administration of its Hazardous Waste Program. The Agency explained its rationale for choosing not to initiate formal withdrawal proceedings, and, in doing so, it engaged in a lengthy discussion of the relevant law and its application to those facts. Thus, EPA's interpretation of applicable law can be reviewed against the express language of RCRA and the Agency's own rules.

For instance, the crux of TDSL's argument to EPA was that EPA's Land Disposal Restrictions expressly prohibit the dilution of hazardous wastes to justify land disposal without proper treatment. *See* 40 C.F.R. § 268.3(a). This prohibition is especially important in the case of lead-bearing waste, where dilution simply increases the volume of a waste without removing or stabilizing the toxic component of the waste. *See* Land Disposal Restrictions for Third Third Scheduled Wastes, 55 Fed. Reg. 22,520 (June 1,

1990), at 22,652 (June 1, 1990). In its Determination, however, EPA has, in essence, interpreted the law to allow the deliberate mixing, or dilution, of toxic characteristic hazardous waste with non-hazardous waste and soil, resulting in a new treatment classification for the diluted waste and, thus, new land disposal restrictions. This is a departure from EPA's rules, its Preamble to those rules, and its prior interpretation and application of those rules.

Where, as here, an interested and affected member of the regulated community requests that EPA evaluate the state's approved hazardous waste program to determine whether it should be withdrawn, EPA should not use this opportunity to, in effect, announce new regulatory requirements and policies and apply those new regulatory requirements to a set of facts that have not been formally adjudicated. An informal investigation and written response to a petition must, at the very least, conform to the applicable law. Congress could not have intended, when it required EPA to respond to a petition, that EPA would use that response as an opportunity to arbitrarily and capriciously apply the law.

The D.C. Circuit Court of Appeals articulated the problems that would arise were an agency allowed to announce new regulatory interpretations in the context of non-enforcement decisions: "We would be handing agencies carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement action. Of course, agencies have wide leeway in

choosing to announce rules and interpretations in the course of adjudications. [Citations omitted.] But our approval of the authority to interpret and implement statutory authority through adjudications has always contemplated the availability of judicial review to ensure that the announced interpretations are consistent with the governing statute. Nothing in *Heckler v. Chaney* changed any of this." *Int'l Union*, 783 F.2d at 246.

EPA's Determination does more than simply provide a cursory, ad hoc decision foregoing initiation of formal withdrawal proceedings. Rather, the Agency's statement of the law provides the Court with a clear and easily reviewable statement of reasons for its decision.

This is particularly important in environmental cases involving the EPA, an agency that has delegated much of its authority to states to implement its federal regulations. It is naïve to think that the federal agency's adjudication of a particular factual scenario and its interpretation and application of its regulations has no impact on how a state agency will interpret and implement those regulations to other similar factual disputes. And because there was no opportunity for TDSL to challenge the factual and legal determinations made by the federal agency, TDSL has little recourse in attempting to rebut reliance on the Determination.

Indeed, the D.C. Circuit has also found significant cases in which the agency's non-enforcement

decision related to whether a state should continue to have primary responsibility for the enforcement of a federal Act – such as the case presented here. In the *National Wildlife Federation* case, the D.C. Circuit court of appeals noted that an issue related to whether federal or state authorities should have primary enforcement authority to administer the Safe Drinking Water Act "is somewhat different from the typical enforcement context in which *Chaney* originated or is customarily applied." 980 F.2d at 773, n.3. Here the concern is not so much remedying or sanctioning a particular statutory violation but instead determining who will have overall responsibility for the safety of a state's public water drinking supply. *Id.*

In sum, the Fifth Circuit's analysis was woefully deficient in providing a meaningful review of the various factors that support judicial review of an agency's decision under the APA. This is in conflict with various other circuit courts of appeals, and it should be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
dof@lf-lawfirm.com

Counsel for Petitioner

October 5, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-50274

TEXAS DISPOSAL SYSTEMS LANDFILL INC,

Plaintiff-Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, Regional Administrator; LISA P. JACKSON, Administrator,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:06-CV-642

(Filed May 7, 2010)

Before JONES, Chief Judge, and HIGGINBOTHAM and ELROD, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Texas Disposal Systems Landfill, Inc. ("TDSL") petitioned the United States Environmental Protection Agency ("EPA") to withdraw its authorization of Texas's hazardous waste program. TDSL alleged that Texas was in violation of the federal Resource Conservation and Recovery Act ("RCRA"). The EPA issued a Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program ("Determination") and found no cause to commence withdrawal proceedings. TDSL then filed suit in the district court challenging the EPA's Determination under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The district court dismissed TDSL's complaint for lack of subject-matter jurisdiction, holding that the EPA's Determination was a nonreviewable discretionary agency action. TDSL now appeals. We review the question of subject-matter jurisdiction *de novo*. *Lundeen v. Mineta*, 291 F.3d 300, 303 (5th Cir. 2002).

Under the APA, an agency's decision not to invoke an enforcement mechanism provided by statute is not ordinarily subject to judicial review. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656 (1985) ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)"). However, this presumption against judicial review may be rebutted if the statute "circumscribes agency enforcement discretion, and has provided meaningful standards for defining the limits

of that discretion." *Heckler*, 470 U.S. at 834-35, 105 S. Ct. at 1657.

TDSL argues the EPA's own regulations circumscribe the agency's discretion and provide the court with law to scrutinize the Determination. We disagree. Neither the statute nor the regulations present standards by which we can review the EPA's decision not to commence withdrawal proceedings. Under RCRA, whenever the EPA Administrator determines after public hearing that a state is not in compliance, he *shall* notify the state. 42 U.S.C. § 6926(e). If the state does not take corrective action within a reasonable time, then the Administrator *shall* withdraw authorization. *Id.* Under EPA regulations, the Administrator *may* order the commencement of withdrawal proceedings on his own initiative or in response to a petition from an interested person. 40 C.F.R. § 271.22(a). The Administrator *may* conduct an informal investigation of the allegation in the petition to determine whether cause exists to commence withdrawal proceedings. *Id.* The regulations provide a non-exclusive list of circumstances under which a state's authorization *may* be withdrawn. *Id.* The EPA Administrator *must* respond in writing to any petition to commence withdrawal proceedings. 40 C.F.R. § 271.23(b)(1). Thus, the EPA is only limited in that it must withdraw authorization after it has determined that the state is not in compliance. *See Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 452 (5th Cir. 2003). Here the EPA did not find as such, and thus, the Determination is not subject to review.

Second, TDSL argues that the EPA's Determination is reviewable because it is not merely a refusal to enforce, but an informal adjudication. TDSL argues that although the EPA declined to commence withdrawal proceedings, it "acted" by providing interpretation and analysis of applicable law in the Determination. We find this argument unpersuasive and contrary to the Supreme Court's holding that an action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action. *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283, 107 S. Ct. 2360, 2368 (1987).

We agree with the district court's holding that the EPA's decision not to commence withdraw proceedings is a discretionary, non-enforcement decision that is unreviewable.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50274

D.C. Docket No. 1:06-CV-642

TEXAS DISPOSAL SYSTEMS LANDFILL INC,

Plaintiff-Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, Regional Administrator; LISA P. JACKSON, Administrator,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas, Austin

Before JONES, Chief Judge, and HIGGINBOTHAM and ELROD, Circuit Judges.

JUDGMENT

(Filed May 7, 2010)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	§	
PLAINTIFF,	§	CAUSE NO.
V.	§	A-06-CA-642-LY
U.S. ENVIRONMENTAL PROTECTION AGENCY; RICHARD E. GREENE, REGIONAL ADMINISTRATOR; AND STEPHEN L. JOHNSON, ADMINISTRATOR,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jan. 28, 2009)

Before the Court are the EPA's Motion to Dismiss for Lack of Jurisdiction filed August 15, 2008 (Doc. #41); Plaintiff's Response to EPA's motion to Dismiss for Lack of Jurisdiction filed September 23, 2008 (Doc. #48); and Corrected Reply in Support of EPA's Motion to Dismiss for Lack of Jurisdiction filed October 10, 2008 (Doc. #53). Having considered the motion, response, reply, along with the applicable law in this cause, the Court concludes that the motion should be granted and Plaintiff's claims dismissed without prejudice for the reasons to follow.

BACKGROUND

On November 14, 2005, Plaintiff Texas Disposal Systems Landfill, Inc. ("TDSL") submitted a "Petition of Texas Disposal Systems Landfill, Inc. to U.S. Environmental Protection Agency for Withdrawal of Approval of the Hazardous Waste Program of the State of Texas" to the Administrator and Region 6 Regional Administrator of Defendant U.S. Environmental Protection Agency (the "EPA"). TDSL alleged that Texas's Hazardous Waste Program was not in compliance with federal requirements imposed by the Solid Waste Disposal Act. *See* 42 U.S.C. § 6901, *et seq.* (2003 & Supp. 2008). On May 16, 2006, the EPA issued a "Determination as to Whether Cause Exists to Withdraw the Texas RCRA [Resource Conservation and Recovery Act] Program" ("Determination"). In its Determination, the EPA concluded that no cause existed to commence proceedings to withdraw approval of Texas Hazardous Waste Program and denied TDSL's petition.

On August 14, 2006, the TDSL filed its Original Complaint challenging the EPA's Determination pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2007). On September 22, 2006, the parties filed a Joint Motion to Stay Proceedings, which the Court granted. Because the TDSL also filed petitions for review in the D.C. Circuit and Fifth Circuit Courts of Appeals, the parties sought and the Court granted an additional motion to continue stay.

Both petitions for review were subsequently dismissed following the EPA's filing of motions to dismiss challenging the Courts' jurisdiction, after which this Court lifted the stay in this cause. Following the Court's order lifting the stay, Defendant EPA filed the instant motion to dismiss for lack of jurisdiction.

ANALYSIS

Standard of Review

In its motion, the EPA seeks dismissal of the TDSL's claims for lack of subject-matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1). In ruling on such a motion, the Court may rely on: "1) the complaint alone; 2) the complaint supplemented by undisputed facts; or 3) the complaint supplemented by undisputed facts and the court's resolution of disputed facts." *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). Once jurisdiction is challenged, the burden rests upon the party seeking to invoke the Court's jurisdiction to prove that jurisdiction is proper. *Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995). "It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction is lacking." *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998) (internal quotations omitted).

Jurisdiction and Judicial Review under 28 U.S.C. § 1331

Federal courts are empowered to hear "all civil actions arising under the Constitution, laws, or treaties of the United States". 28 U.S.C. § 1331 (2006). However, federal courts "possess only that power authorized by Constitution and statute. . . . It is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). Federal-court jurisdiction may not be expanded by judicial interpretation or decree. *See id.* (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951)).

EPA asserts that TDSL's claims should be dismissed because the APA does not permit review of the EPA's Determination as the decision to institute proceedings to withdraw the Texas RCRA Program is an "action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In response, TDSL concedes that an agency's refusal to pursue an enforcement action is unreviewable in the absence of contrary congressional intent, *see Heckler v. Chaney*, 470 U.S. 821, 838 (1985), but argues that the EPA's analysis of the applicable law contained in the Determination can be reviewed against the express language of RCRA and the EPA's own rules thereby constituting an "act to enforce" that "provides a focus for judicial review, inasmuch as the agency must have

exercised its power in some manner." *Id.* at 832. EPA notes in its reply that the majority of U.S. Supreme Court has expressly rejected this principle of reviewability based upon the reasoning contained in an unreviewable agency decision. *See Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). The Court agrees.

The APA "codifies the nature and attributes of judicial review, including the traditional principle of its unavailability 'to the extent that . . . agency action is committed to agency discretion by law.'" *Id.* at 282 (quoting 5 U.S.C. § 701(a)(2)). The Supreme Court has applied this limitation to the general grant of jurisdiction contained in Section 1331 of Title 28 of the United States Code (*see Interstate Commerce Comm'n.*, 482 U.S. at 282; *Heckler*, 470 U.S. at 838), finding that an agency decision not to enforce, reopen, or otherwise act "has traditionally been 'committed to agency discretion,' and . . . that the Congress enacting the APA did not intend to alter that tradition." *Heckler*, 470 U.S. at 832; *see also Interstate Commerce Comm'n*, 482 U.S. at 282. The Court finds that a similar tradition of nonreviewability exists with regard to the EPA's Determination not to withdraw the Texas RCRA Program that section 701(a)(2) of the APA was meant to preserve. Whether or not EPA includes a "reviewable" reason for its otherwise unreviewable action in the Determination does not render the action as a whole reviewable. *Interstate Commerce Comm'n*, 482 U.S. at 283. Because the

EPA's Determination is unreviewable, the Court lacks subject-matter jurisdiction over TDSL's claims.[1]

CONCLUSION

IT IS THEREFORE ORDERED that the EPA's Motion to Dismiss for Lack of Jurisdiction filed August 15, 2008 (Doc. #41) is **GRANTED**. All of Plaintiff Texas Disposal Systems Landfill's claims against Defendants U.S. Environmental Protection Agency, Richard E. Greene, and Stephen L. Johnson are **DISMISSED WITHOUT PREJUDICE** for lack of subject-matter jurisdiction.

SIGNED this 28th day of January, 2009.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

[1] The EPA also raises the issue of standing in its motion to dismiss. Because the Court finds subject-matter jurisdiction lacking due to the unreviewability of the EPA's Determination under the APA, the Court declines to address whether TDSL has standing to challenge the EPA's Determination.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	§	
PLAINTIFF,	§	CAUSE NO.
V.	§	A-06-CA-642-LY
U.S. ENVIRONMENTAL PROTECTION AGENCY; RICHARD E. GREENE, REGIONAL ADMINISTRATOR; AND STEPHEN L. JOHNSON, ADMINISTRATOR,	§	
DEFENDANTS.	§	

FINAL JUDGMENT

(Filed Jan. 28, 2009)

Before the Court is the above-entitled cause. On this same date, the Court granting Defendant U.S. Environmental Protection Agency's motion to dismiss for lack of subject-matter jurisdiction. Accordingly, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS HEREBY ORDERED the EPA's Motion to Dismiss for Lack of Jurisdiction filed August 15, 2008 (Doc. #41) is **GRANTED**.

IT IS FURTHER ORDERED that all of Plaintiff Texas Disposal Systems Landfill's claims against

Defendants U.S. Environmental Protection Agency, Richard E. Greene, and Stephen L. Johnson are **DISMISSED WITHOUT PREJUDICE** for lack of subject-matter jurisdiction

IT IS FURTHER ORDERED that all relief not expressly granted is hereby **DENIED**.

IT IS FINALLY ORDERED that the case hereby **CLOSED**.

SIGNED this 28th day of January, 2009.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

Docket No: W/Petition-TX/RCRA-06-2006-0001

Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program

(Filed May 17, 2006)

RESPONSE TO THE PETITION

May 16, 2006

This is the determination as to whether cause exists for the United States Environmental Protection Agency Region 6 ("Region") to commence proceedings for withdrawing authorization of Texas' hazardous waste program managed by the Texas Commission on Environmental Quality ("TCEQ") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 3006(e), and 40 C.F.R. Parts 271.22 and 271.23, as requested by Texas Disposal Systems Landfill, Inc. ("TDSL" or "Petitioner").

Background

On November 14, 2005, TDSL submitted its "Petition of Texas Disposal Systems Landfill, Inc. to U.S. Environmental Protection Agency for Withdrawal of Approval of the Hazardous Waste Program of the State of Texas" (hereinafter the "Petition") to the EPA Administrator and EPA Region 6 Regional Administrator. The Regional Administrator has been delegated the authority to take action relative to the authorization of Texas' hazardous waste program pursuant to RCRA (referred to by the Petition as the "hazardous waste program" of the State of Texas). *See*

EPA Delegation Authority number 3-7, 1200 TN 350 (May 11, 1994) (State Hazardous Waste Programs); *See also* 40 C.F.R. § 272.2201 (Texas State-administered program: final authorization).

On December 7, 2005, the Region forwarded a copy of the Petition to TCEQ stating that the Region was beginning an informal review of the Petition and requesting that TCEQ forward to the Region any response or information TCEQ might have concerning the Petition. The Region received a response from TCEQ on December 16, 2005, with ten attachments. TDSL also sent in two subsequent letters regarding the Petition. In a letter dated December 29, 2005, TDSL responded to a letter dated December 16, 2005, from Pamela Giblin, counsel for Penske Truck Leasing Co., L.P. ("Penske") to Troy Hill, Associate Director, EPA Region 6 RCRA Programs Division. In a letter dated January 24, 2006, TDSL responded to a letter dated December 15, 2005, from Glenn Shankle, Executive Director of TCEQ, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division. The Region thereafter commenced its informal investigation into the allegations of the Petition pursuant to 40 C.F.R. §§ 271.22 and 271.23, reviewing these and other documents. This informal investigation is now complete.

Framework for Review of a Petition to Withdraw Approval of an Authorized State RCRA Program

Congress established within RCRA provisions for promulgating regulations to effectuate state program development, for authorizing state programs, and for withdrawing state program authorization. RCRA §§ 3006(a), (b), and (e).

Pursuant to RCRA § 3006(a), EPA promulgated 40 C.F.R. Part 271. Particularly relevant to reviewing this Petition is 40 C.F.R. § 271.23(b)(1) which provides:

> The Administrator *may* order the commencement of withdrawal proceedings . . . in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in § 271.22. . . . The Administrator shall respond in writing to any Petition to commence withdrawal proceedings. He *may* conduct an informal investigation of the allegations in the Petition to determine whether cause exists to commence proceedings under this paragraph (271.23(b)). . . . (Emphasis added.)

Whether to order the commencement of withdrawal proceedings or conduct an informal investigation of the allegations in a petition are both within the discretion of EPA. The Region here, however, has conducted an informal investigation of the allegations of the Petition regarding TCEQ's authorized RCRA

program to determine whether cause exists to commence withdrawal proceedings. In order to make this determination, EPA looked to the provisions of 40 C.F.R. § 271.22(a), which specify circumstances under which withdrawal may be appropriate:

> (a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action. Such circumstances include the following:
>
> (1) When the State's legal authority no longer meets the requirements of this part including:
>
> (i) Failure of the State to promulgate or enact new authorities when necessary; or
>
> (ii) Action by a State legislature or court striking down or limiting State authorities.
>
> (2) When the operation of the State program fails to comply with the requirements of this part, including:
>
> (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
>
> (ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) When the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed;

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 271.8.

EPA has analyzed the Petition allegations within the framework of this regulation. However, Petitioner does not specifically explain how its allegations establish that the State's program no longer meets the requirements of 40 C.F.R. Part 271. Petitioner only cites to 40 C.F.R. § 271.22(a) generally as the bases for why it believes cause exists to commence a proceeding to withdraw. It is difficult for EPA to evaluate this general assertion without any discussion of the specific bases for withdrawal, such as those listed in 40 C.F.R. §§ 271.22(a)(1)-(a)(4).

Authorizing a hearing to withdraw any state's program is a serious matter and should occur only where there are reliable facts and support for the

allegations. While EPA must ensure that each state is maintaining a program in accordance with the statute and regulations cited above, EPA also must be mindful of the significant impact on the states of having to respond to these petitions and defend its implementation of its authorized program in a possible hearing. Authorizing such a proceeding should not be done lightly. Each petition requires the relevant state agency to incur significant costs to defend its implementation of the program, costs both in terms of funds and staff time. These are resources that would be otherwise directed to developing and issuing permits or in pursuing and prosecuting violations of environmental programs. Further, two courts have noted that: "[w]ithdrawal of authorization for a state [RCRA] program is an "extreme" and "drastic" step. . . ." *U.S. v. Power Engineering Company,* 303 F.3d 1232, 1238 (10th Cir. 2002) (citing *Waste Management of Illinois v. EPA*, 714 F.Supp. 340, 341 (N.D. Ill. 1989)). Furthermore, EPA believes there must be a broad programmatic concern with a state program in order to support a finding that the state program fails to comply with the requirements of 40 CFR Part 271, rather than issues associated with a single incident.

Summary of Petitioner's Allegations for Withdrawal of the RCRA Program

Petitioner's allegations that TCEQ misinterprets the rules stems from a highway accident involving a truck hauling 19-inch color televisions and more

specifically, the disposition of the debris from that accident, particularly cathode ray tubes ("CRTs") contained in the televisions. Penske was shipping the televisions for Zenith Electronics Corporation ("Zenith"). The accident debris was hauled to TDSL which is a RCRA municipal solid waste landfill (not a hazardous waste landfill). Petitioner alleges the CRTs contained in the televisions are characteristic hazardous waste under RCRA for toxicity for lead. At least some of the CRTs were mixed with non-hazardous accident debris, solid waste, and soil when they were placed into the face of the TDSL landfill. This mixture of solid waste and CRTs was subsequently removed from the landfill, sorted for visible CRT parts which were taken to another facility, and the remaining removed waste ("exhumed waste") was containerized at TDSL. Many of the Petitioner's allegations of fact, if not all of them, are adamantly disputed by Penske and Zenith in ongoing civil litigation and appeals of administrative decisions.

The Petitioner has alleged many facts in the Petition and argues that Texas' RCRA program conflicts with all four of the circumstances from 40 C.F.R. § 271.22, quoted above. For purposes of EPA's determination, however, it is not necessary to determine the veracity of all of the factual allegations because the Petitioner's argument is a legal one – TCEQ's alleged misinterpretation of the law. Petitioner argues that because of this alleged TCEQ misinterpretation of the law, each of the circumstances of 40 C.F.R. § 271.22 are met. Although Petitioner fails to

specifically describe how its allegations meet any one of the circumstances, the gravaman of the Petition is that "TCEQ has interpreted language in its rules, which is essentially the same as the language in EPA's rules, in a way that conflicts with both the clear language of the rules and EPA's interpretation of its rules." Petition at 2.

Question of Law

In light of the factual disputes and the litigation, EPA does not believe it is appropriate to act as the finder of fact. This is particularly true in the context of remediation such as here. Authorized states are encouraged to reasonably interpret their authorized programs. The Petition can thus be decided as a question of law. In a letter dated January 24, 2006, to EPA Region 6, TDSL apparently agreed that the issue is a question of law. In that letter TDSL stated:

> The facts are discussed in detail in the Petition, but in general *the legal issues* for EPA boil down to whether, *under Federal law,* these characteristic toxic hazardous wastes [allegedly the CRTs] can be treated as non-hazardous waste once mixed with other wastes.

Letter dated January 24, 2006, from Richard W. Lowerre and James B. Blackburn, Jr., attorneys for TDSL, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division, at 1 (emphasis in original). Essentially, TDSL argues that the

core issue is a legal rather than factual one. Thus, EPA believes it is appropriate to simply answer the legal question, which is: whether a RCRA characteristic hazardous waste mixed with non-hazardous material is still hazardous waste under RCRA and must be treated and disposed of pursuant to RCRA land disposal restrictions even though the resulting mixture tests below RCRA characteristic hazardous and land disposal restriction levels.[1]

Analysis of the Petition

Petitioner contends that TCEQ has wrongly interpreted the RCRA regulations regarding what is a characteristic hazardous waste and whether that waste must be treated before land disposal.

Regulatory Background

RCRA "is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with . . . rigorous safeguards and waste management procedures." *Chicago v. Environmental Defense Fund,* 511 U.S. 328, 331, 114 S.Ct. 1588, 1590, 128 L.Ed.2d 302 (1994). RCRA requires EPA to regulate the identification, disposal, and treatment of "hazardous waste," which is defined as a solid waste, or combination of solid wastes,

---

[1] EPA is analyzing the Petition using the cites to the EPA regulations for convenience, but the operative Subtitle C regulations are those adopted by Texas and authorized by EPA.

which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (1) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903(5). "Solid waste" is defined as any "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial [or] commercial . . . operations." *Id.* § 6903(27).

RCRA requires EPA to develop and promulgate circumstances for identifying the characteristics of hazardous waste and for listing hazardous waste. 42 U.S.C. § 6921(a). EPA must take into account "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." *Id.* EPA must "promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter." *Id.* § 6921(b)(1). Therefore, pursuant to 42 U.S.C. § 6921, EPA hazardous wastes fall into two categories: (1) they possess one of the four hazardous characteristics identified by the EPA in 40 C.F.R. Part 261, Subpart C (ignitability, corrosivity, reactivity, or toxicity), or; (2) they have been found to be hazardous as a result of an EPA rulemaking. *See id.*

§ 261.3(a)(2)(i) (1991); *see id.* Part 261, Subpart D ("listed wastes"). The first category of hazardous waste is often referred to as "characteristic" hazardous waste. The second category is often referred to as "listed" hazardous waste.

Both characteristic hazardous wastes and listed hazardous wastes are subject to regulation under Subtitle C of RCRA, which applies stringent management standards to the generation, transportation, treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C. §§ 6921 and 6925. However, as one can see from the statutes and regulations discussed above, "characteristic" and "listed" hazardous wastes are two very distinct categories of hazardous waste and are regulated differently by EPA.

The Mixture Rule

The Petitioner questions TCEQ's interpretation of the RCRA "mixture rule." 40 C.F.R. § 261.3(a)(2). Petitioner argues that the proper interpretation of RCRA means that "mixing the spilled hazardous waste with municipal solid waste does not defeat the materials' hazardous waste designation under RCRA." Petition Exhibit 1, at 8. In other words, Petitioner argues that if a waste is a characteristic hazardous waste and that waste is mixed with non-hazardous material, the resulting mixture is still characteristic hazardous waste, even if it does not exhibit any characteristics of hazardous waste. Petitioner alleges

that TCEQ failed to regulate the exhumed waste consistent with this interpretation.

Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this alleged misinterpretation of law could arguably fall under the circumstance at 40 C.F.R. § 271.22(a)(2)(i), which states "When the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part. . . ." The alleged misinterpretation would be that TCEQ did not exercise control over the CRT waste as a hazardous waste.[2]

The Petitioner's interpretation of the law is incorrect. The federal interpretation of RCRA is that if a characteristic hazardous waste is mixed with non-hazardous solid waste, and that resulting mixture (other than wastes not at issue here such as beneficiation wastes) does not exhibit any characteristics of hazardous waste, then the resulting mixture is no longer characteristic hazardous waste. EPA did not

---

[2] This alleged misinterpretation would not fall under 40 C.F.R. § 271.22(a)(1), regarding legal authority, because Petitioner alleges that the language in TCEQ's rules at issue "is essentially the same as the language in EPA's rules. . . ." Thus, the question is not one of whether TCEQ has the appropriate legal authority. 40 C.F.R. §§ 271.22(a)(3) and (4) are discussed in other sections of this determination, *infra*.

intend the mixture rule to apply to characteristic hazardous wastes. This is evident in the plain language of the RCRA regulation covering the definition of solid and hazardous waste that states:

> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
>
> > (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. . . .

40 C.F.R. § 261.3(d)(1).

Contrary to Petitioner's claim, the "mixture rule" in 40 C.F.R. § 261.3(a)(2) does not apply to the mixture of wastes here. In 2001 EPA reaffirmed its regulatory definition of a listed "hazardous waste" to include, subject to certain exceptions, "a mixture of solid waste and one or more hazardous wastes **listed** in Subpart D of this part. . . ." 40 C.F.R. § 261.3(a)(2)(iv) (emphasis added); *see* 66 Fed. Reg. 27,266. This rule was ultimately upheld in *American Chemical Counsel v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003) (discussing EPA's policy behind why the mixture rule does not apply to characteristic hazardous waste). Thus, even if the solid waste and CRTs were a characteristic hazardous waste when added to the landfill, the exhumed waste, which presumably was a mixture of solid waste, CRTs, and landfill waste and cover, would not automatically be characteristic hazardous waste. If the exhumed waste at TDSL does not exhibit any

characteristics of hazardous waste, then the waste would not be hazardous waste under RCRA.

This is the interpretation followed by TCEQ for the exhumed waste. Since TCEQ has interpreted state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program, EPA does not find – on the basis of the mixture rule – that cause exists to commence a proceeding for withdrawal of Texas' RCRA program.

Land Disposal Restrictions

TDSL also argues that if the alleged TCEQ interpretation of the law stands, and the exhumed waste may be considered non-hazardous even if it does not exhibit a characteristic of hazardous waste, that "[n]o treatment would be required prior to disposal." Petition at 2. EPA assumes for the purpose of this determination that TDSL is arguing that TCEQ has misinterpreted the Land Disposal Restrictions rules found at 40 C.F.R. Part 268 ("LDRs"). Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this second alleged misinterpretation of law regarding LDRs could arguably fall under 40 C.F.R. § 271.22(a)(2)(i), which states "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over

activities required to be regulated under this part. . . ."[3]

Regarding LDRs, 40 C.F.R, § 261.2(d) provides:

> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
>
> > (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. (*However, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of part 268* [land disposal restrictions], *even if they no longer exhibit a characteristic at the point of land disposal.*)

40 C.F.R. § 261.3(d)(1) (emphasis added).

Thus, land disposal restrictions may apply to once-characteristic hazardous wastes that no longer exhibit a characteristic when they are disposed. *Chemical Waste Management v. EPA*, 976 F.2d 2, at 14, 16 (D.C. Cir. 1992). If a waste as generated exhibits a characteristic, it ordinarily must meet LDR treatment standards before it may be land disposed, even if it no longer exhibits a characteristic (or is otherwise hazardous) at the time of disposal.

---

[3] *See* footnote 2, as to why EPA believes 40 C.F.R. § 271.22(a)(1) does not apply. *See* discussion, *infra,* as to (3) and (4).

EPA has also adopted special land disposal restriction rules for remediation wastes. See 63 FR 28,566, 28,602-28,622 (May 26, 1998) (contaminated soils); 57 FR 37,194, 37,211-37,243 (August 18, 1992) (contaminated debris).[4] These include fact-dependent principles as to what the point of generation is for such wastes, which in turn determines whether land disposal restrictions apply, and if so, which ones. See. e.g. 63 FR at 28,617-28,620.

Here, a number of critical facts remain in dispute and will not be resolved until litigation, or resolution in another forum such as alternative dispute resolution, is concluded. These include whether the initial waste (the amalgamation of CRTs and soil picked up after the accident) exhibited a characteristic, the extent to which CRTs were removed from that amalgamated mixture, whether as a result of this removal the waste ultimately exhumed from the landfill is deemed to be newly generated for purposes of LDRs, and the contents of the exhumed waste. All of these facts bear on if and when LDRs apply, and if so, which specific treatment standards would be applicable.

---

[4] "Soil," among other things, means "a mixture of [soil] with liquids, sludges, or solids which is inseparable by simple mechanical removal processes and is made up primarily of soil by volume. . . ."; and "debris" includes "solid material exceeding a 60 mm particle size such as manufactured objects, plant or animal matter, or geologic material. *See* 40 C.F.R. §§ 268.2(k) and (g).

Assuming LDRs apply, there are two treatment standards which are potentially applicable. The first is for D008 wastes generally (wastes exhibiting the characteristic for lead). This standard is 0.75 mg/l using the Toxic Characteristic Leaching Procedure ("TCLP") (plus meeting treatment standards for other hazardous constituents present in the waste matrix). 40 C.F.R. § 268.40 Table.

The second of these standards are separate LDR treatment standards for soils and debris. Since many spill residues are either soil or debris, it would seem at least possible that the mixture initially picked up here would be one or the other. Treatment standards for soils subject to LDR are ten times the universal treatment standard for the constituent at issue, or a 90% reduction in mobility for that constituent. *See* 40 C.F.R. §§ 268.49(c)(1)(B) and (C). For lead, this would be a level of 7.5 mg/l measured by the TCLP (or a 90% reduction in mobility from lead levels in the waste as-generated). Treatment standards for debris are work practices (such as separating the contaminating fraction from otherwise inert dirt) rather than numerical levels. 40 C.F.R. § 268.45. The State of Texas has provided EPA TCLP data from samples of the exhumed waste and none of these reported data exceed any of the potentially-applicable LDR treatment standards. Thus, even assuming that LDRs apply to the initial mixture, and continue to apply to the exhumed waste, the exhumed waste potentially can be legally land disposed, regardless of which (if any) of the potential LDRs apply.

Because the facts are in dispute, this matter is in litigation, and the waste has not been disposed of at this time, it is unclear what position TCEQ would take regarding LDRs for this truck accident and the exhumed waste.[5] It is also unclear that this answer has a practical consequence if the exhumed waste meets any of the treatment standards which could be applicable. Thus, EPA finds no basis at this time to conclude that TCEQ's approach to the LDR regulations is contrary to the requirements of 40 C.F.R. Part 271, nor does EPA believe TCEQ has done anything in this situation to suggest a programmatic conflict between the state and federal LDR regulations. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

Impermissible Dilution of the Waste

TDSL's Petition also argues that: "TCEQ has interpreted its rules to allow wastes classified as hazardous due to their toxic characteristics to be subsequently **diluted** or mixed and then reclassified as non-hazardous wastes." Petition at 2 (emphasis added). As stated previously, Petitioner does not

---

[5] EPA understands that TCEQ proposes sending the waste to a facility that would further test the exhumed waste to see if it exhibits a characteristic (a level less than the treatment standards for soils, e.g. 5.0 mg/l TCLP versus the treatment standard for soil of 7.5 mg/l TCLP, as explained in the previous paragraph) and make a disposal determination.

discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. Like the interpretation of law regarding whether the exhumed waste is hazardous and the interpretation of law regarding LDRs, for purposes of EPA's analysis, this third alleged misinterpretation of law regarding dilution could arguably fall under 40 C.F.R. § 271.22(a)(2)(i), "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part. . . ."[6]

A person is prohibited from diluting "a restricted waste . . . as a substitute for adequate treatment to achieve compliance with [the applicable treatment standard] to otherwise avoid a prohibition in subpart C of the part, or to circumvent a land disposal prohibition imposed by RCRA section 3004." 40 C.F.R. § 268.4. On January 15, 2004, TCEQ sent a letter to TDSL stating that: "40 Code of Federal Regulations Section 268.3 prohibits dilution as a means to render a characteristic hazardous waste as non-hazardous." This letter indicates that TCEQ interprets the law consistently with EPA's interpretation. EPA has no reason to believe TCEQ has taken a position contrary to EPA regulations. Therefore, EPA does not find that

---

[6] *See* footnote 2, as to why EPA believes 40 C.F.R. § 271.22(a)(1) does not apply. *See* discussion, *infra*, as to (3) and (4).

cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

TCEQ's Enforcement Discretion

Petitioner argues that TCEQ's alleged actions mean the State's RCRA program "does not provide for adequate enforcement of compliance with federal requirements [at] 42 U.S.C. § 6962(b). . . ." Petition at 4. Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this allegation could arguably fall under the withdrawal circumstances at 40 C.F.R. § 271.22(a)(3)(i), which states "[f]ailure to act on violations of . . . other program requirements," and (ii), which states "[f]ailure to seek adequate enforcement penalties . . . " While improper "dilution" of a characteristic hazardous waste under RCRA might be unlawful, dilution of a characteristic hazardous waste has nothing to do with whether the diluted or mixed waste is classified subsequently as characteristic hazardous waste.

That there might have been a violation connected with "dilution" of the exhumed waste event (the facts are disputed) does not mean TCEQ must enforce against the violator. Indeed, EPA Region 6, which has oversight authority over states' enforcement activities, did review TCEQ's actions with regard to the truck accident and the exhumed waste as part of EPA Region 6's informal investigation. EPA Region 6

enforcement personnel believe that TCEQ's enforcement activity with respect to the exhumed waste was properly within TCEQ's discretion.[7]

While Petitioner may disagree with TCEQ's enforcement response in this case, EPA does not believe the allegations presented here provide any grounds to conclude that TCEQ's enforcement program fails to meet the requirements of 40 C.F.R. Part 271. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

The Memorandum of Agreement and Memorandum of Understanding (MOA/MOU)

Petitioner alleges that TCEQ's actions justify commencing withdrawal proceedings pursuant to 40 C.F.R. § 271.22(a)(4): "[w]hen the State program fails to comply with the terms of the Memorandum of Agreement required under § 271.8." EPA and the Texas Natural Resources Conservation Commission (now TCEQ) entered into a Memorandum of Agreement (MOA) on March 27, 2003, and a Memorandum of Understanding (MOU) on April 1, 1999. These

---

[7] Moreover, TCEQ's Executive Director stated that "because this matter is best resolved in court, I do not plan to take further action on Penske's Notice of Violation pending the resolution of this matter in court proceedings." Letter dated December 16, 2005, from Glenn Shankle, Executive Director, TCEQ, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division.

documents entail 24 pages of agreements. Nowhere in the Petition, however, does Petitioner state any term or section of the MOA/MOU with which the TCEQ program fails to comply. For this reason alone, the Petition fails to allege enough facts to justify withdrawal of TCEQ's RCRA program. *See U.S. v. Power Engineering Company,* 303 F.3d 1232, 1238 (10th Cir. 2002); *Waste Management of Illinois v. EPA*, 714 F.Supp. 340, 341 (N.D. Ill. 1989).

The MOA/MOU do generally require that the Texas RCRA program be consistent with the federal RCRA statue and its associated regulations. The MOA states that the Regional Administrator will assess the State's administration of the hazardous waste program for consistency with RCRA. MOA § III.A. And, the MOU has provisions for EPA to review the State's enforcement program's performance. MOU § IV. As discussed above, on the whole, Texas' RCRA program is consistent with the federal RCRA statute, regulations, and TCEQ here enforced within the ambit of its discretionary authority. For this reason also, TCEQ's RCRA program does comply with the MOA/MOU entered into pursuant to 40 C.F.R. § 271.8. Therefore, EPA does not find that cause exists under 40 C.F.R. § 271.22(a)(4) to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

Determination Concerning the RCRA Petition

For the above stated reasons, I have determined that the Petition before me does not provide cause to order the commencement of withdrawal proceedings and I therefore deny the Petition.

/s/ Richard E. Greene
Richard E. Greene
Regional Administrator
EPA Region 6

Dated: 05-16-06

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50274

TEXAS DISPOSAL SYSTEMS LANDFILL INC,

Plaintiff-Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, Regional Administrator; LISA P. JACKSON, Administrator,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING

(Filed Jul. 7, 2010)

Before JONES, Chief Judge, and HIGGINBOTHAM and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

No. 10-464

Supreme Court, U.S.
FILED
DEC 27 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, REGIONAL ADMINISTRATOR; LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
dof@lf-lawfirm.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITION FOR REHEARING

The Petitioner, herein, respectfully moves this Court for an order (1) vacating its denial of the petition for writ of *certiorari*, entered on November 29, 2010, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. EPA's new interpretation of its rules – which represents a departure from its "cradle to grave" regulation of toxic characteristic hazardous wastes – is the type of decision that is subject to appellate review.

In its decision, refusing to review EPA's decision, the 5th Circuit Court of Appeals characterized EPA's decision as one committed to agency discretion and not subject to review. But the Court failed to acknowledge that the presumption of unreviewability does not apply when there is law to apply. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *National Wildlife Federation v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992).

Several Courts have recognized repeatedly that the Supreme Court's holding in *Chaney v. Heckler*, 470 U.S. 821 (1985), does not bar judicial review when an agency's regulation provides the Court with law to apply. *See, e.g., Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000) (citing decisions from 1st, 3rd and 6th Circuit Courts of Appeals). In this case, EPA's regulations provide the Court with law against which to scrutinize EPA's Determination.

The appellate court, below, cited *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987), for the proposition that an agency action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action. But, in reaching its decision in *ICC*, this Court was not construing the APA, and it was not faced with a decision by an agency "not to enforce." Rather, this Court's holding applied to an agency decision denying a petition for reconsideration. Those facts are distinct from those presented in this case.

This case presents a set of facts that, while short of unique, is unusual. Here, EPA did not simply refuse to initiate proceedings to withdraw Texas's RCRA program approval. Here, EPA first conducted an "informal investigation." It, then, made some factual assumptions. And following its investigation, in what it labeled a "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," the EPA recited a detailed legal analysis of the applicable law – not only the law that applies to withdrawing state program approval but, also, the law that applies to the specific factual scenario presented by EPA in this case. In a twelve-page analysis, the "Determination" went beyond determining whether cause exists to withdraw program approval.

Where, as here, an interested and affected member of the regulated community requests that EPA evaluate the state's approved hazardous waste program to determine whether it should be withdrawn,

EPA should not use this opportunity to, in effect, announce new regulatory requirements and policies and, for good measure, apply those new regulatory requirements to a set of "facts" that have not been formally adjudicated. An informal investigation and written response to a petition must, at the very least, conform to the applicable law. Congress could not have intended, when it required EPA to respond to a petition, that EPA would use that response as an opportunity to re-interpret the law, so as to render its application arbitrary and capricious.

In this case, the result of EPA's conduct is that a legal document now exists, one that includes EPA's "legal analysis" of its applicable statutes and rules, and that document reflects that EPA no longer regulates toxic characteristic hazardous waste from "cradle to grave." The document reflects that EPA has departed from its prior interpretation of its governing statute and of its own rules. Prior to the Determination's release, the agency's interpretation had been that the land disposal restrictions attached at the point of hazardous waste generation and that there could be only one point of generation. Now, EPA opines that, once hazardous waste has been diluted, there may be a new point of generation and a new set of applicable land disposal restrictions. This departure from the prior understanding would appear to apply at least in the state of Texas, if not in all other states that have been delegated hazardous waste regulatory authority.

This new interpretation of law is the type of agency action that must be scrutinized by the judiciary. To accord non-reviewable status to this new interpretation, because it is announced as the rationale for non-enforcement, deprives the public of benefits Congress rightfully seeks to secure by judicial oversight of agency action. It allows agencies to avoid their settled self-imposed restrictions on discretion (i.e., their earlier interpretations). This increases the risks that similarly-situated individuals will be treated disparately. Non-review removes, also, some measure of faith in the public that the administrative state, with its labyrinthine regulations and vast practical power, maintains a level playing field for competitors within the public. Finally, non-review undermines an important reasonable market expectation: participants in commercial transactions apportion risks among themselves, in part, in reliance on established regulatory interpretations (and on the fact of safeguards that customarily accompany changes in those interpretations).

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of *certiorari*, Petitioner prays that this Court grant rehearing of the

order of denial, vacate that order, grant the petition, and review the judgment and opinion from below.

Respectfully submitted,

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346

Counsel for Petitioner

December 27, 2010

CERTIFICATE OF COUNSEL

As counsel for the petition, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

David O. Frederick